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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

COMMENTS OF THE
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) February 15, 2002 Notice of Proposed Rulemaking (NPRM) on the appropriate regulatory classification for wireline broadband access to the internet. Specifically, the Commission seeks comments on its tentative conclusion that the provision of wireline broadband internet access provided over a carrier's own facilities is an information service with a telecommunications component. In addition, the Commission seeks comments on what regulations, if any, should apply to the provisioning of these services in the event the Commission adopts its tentative conclusion.

The NYDPS supports the continuation of the Commission's existing policy of permitting competing local exchange carriers (CLECs) access to incumbent local exchange carriers' (ILECs) unbundled network elements (UNEs) for the purpose of encouraging competition, including competition for access to the internet. We remain concerned that unless CLECs have access to ILECs' facilities to provide high-speed internet access, they will not be able to compete for local service.

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The Commission's tentative conclusion that the transmission component of retail wireline broadband internet access, when provided over a carrier's own transmission facilities, is an information service with a telecommunications component is incorrect. However, if the tentative conclusion is adopted, we urge the Commission to continue to require, pursuant to its open network architecture (ONA) rules, the unbundling of the local loop and the associated transmission facilities necessary for CLECs to provide digital subscriber line (DSL) services.

I. Unbundling Transmission From Internet Access Services Serves An Important National Goal

As the Commission stated, a fundamental goal of the 1996 Telecommunications Act (1996 Act or Act)[1] is to promote competition in the telecommunications marketplace, including competition for local and advanced services.[2] New York has strived to eliminate barriers to the development of competition in the advanced services market.[3] The NYDPS requires Verizon New York, Inc., f/k/a Bell Atlantic-New York (Verizon) to make available to voice CLECs the high-speed portion of the local loop (line-splitting).[4] The NYDPS found that lack of access to line splitting impaired the ability of both voice and data CLECs to provide customers with these desired services (now roughly 20% of the New York residential market) in conjunction with voice service. New York's progress in opening markets to competition could be impaired if the Commission prohibits unbundling for internet access purposes. Moreover, we remain concerned that consumers should have access to new services and competitive choices.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq.

[2] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, Memorandum, Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998).

[3] Case 00-C-0127, Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities, Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services, Opinion No. 00-12 (issued October 31, 2000); Order Granting Clarification, Granting Reconsideration in Part and Denying Reconsideration in Part and Adopting Schedule (issued January 29, 2001)(DSL Orders).

[4] The NYDPS requires Verizon to offer packet switching as a UNE where it is technically feasible to place line cards in Verizon's next generation DLC terminals, and where this is the only commercially viable method for CLECs to provide DSL to end-users.

While wireline ILECs are competing for broadband with cable offerings, CLECs still must rely on the ILECs' network facilities to reach their customers.[5] Thus, the CLECs' ability to access these essential facilities is critical to sustaining competition in the local and advanced services markets. Without such access, ILECs could be the only providers of both voice service and wireline broadband internet access.

II. The Commission's Tentative Conclusion That Wireline Broadband Internet Access Is An Information Service With A Telecommunications Component Is Contrary To Law

The Commission has tentatively concluded that, as a matter of statutory interpretation, when carriers provision wireline broadband internet access over their own facilities, they are providing information services with a telecommunications component. The Commission reasoned that when carriers provide internet access over their own facilities, end-users receive an integrated package of transmission and information processing capabilities and this offering should be classified as an information service with a telecommunications component.[6]

Broadband internet access consists of two distinct services. One, an information service,[7] and the other, a telecommunications service.[8] Consumer access to the internet is provided in two steps. The first is a dial-up call to an internet service provider's (ISP) point-of presence (POP), and the second is from the ISP's POP to the internet. Historically, the call to the ISP's POP has been treated as common carriage.

[5] There are historical differences that permit the treatment of cable companies differently than telephone companies. Cable service has never been classified as common carriage and unlike the public switched network, which has been funded through rates, the cable industry developed through private sector risk capitol.

[6] NPRM ¶ 25.

[7] The Act defines information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

[8] The Act defines telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used." 47 U.S.C. § 153(46).

This two step analysis is consistent with Commission precedent where the Commission has examined new services under its existing regulatory and statutory framework.[9]

Thus, when an ILEC offers both transmission and internet access to consumers, the ILEC's transmission offering should be treated as a telecommunications service because the transmission is being offered to the public and the public is purchasing the transmission required to complete their access to the internet.[10] Whether an ILEC offers transmission on a stand-alone basis or as a bundled service directly to the public should not change the statutory nature of the transmission portion of that service. It should be classified as a telecommunications service.

III. Assuming The Commission Adopts Its Tentative Conclusion, Competing Carriers Should Still Have Access To The Network Elements Needed To Provide Advanced Services

In the event the Commission adopts its tentative conclusion, the Commission's ONA rules should be applied to ensure that CLECs have access to the essential facilities[11] required to deploy advanced services. Under the Commission's ONA rules, ILECs are required to, among other things, give their competitors access to their network functionalities by offering unbundled basic service building blocks on a competitively neutral basis.[12] Further, ILECs are required to

[9] For example, in the Commission's Computer II rulings, the Commission classified all services over a telecommunications network as basic or enhanced. ILECs that own common carrier transmission facilities and also provide enhanced services are required to make their monopoly transmission inputs available to competitors. While the Commission lightly regulated enhanced services under Title I, it fully regulated the transmission component under Title II. Computer II, 77 FCC 2d 384. 419-433 (1980). In its voice mail decisions, the Commission classified voice mail as an enhanced service, while the underlying telecommunications transmission was a telecommunications service subject to Title II. Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 FCC 2d 958 (1986); In the Matter of Pacific Bell and Navada Bell Plan for the Provision of Voice Mail Services, 3 FCC Rcd 1095 (1988). More recently, the Commission recognized that the service linking end-users to ISPs is a telecommunications service because ILECs are making an offering to the public. In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum, Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, ¶ 35 (1998).

[10] The Commission has made previous distinctions to allow for the unregulated development of enhanced services, while protecting open access to the basic network. Doing so allows for competitive access to the underlying basic services of the facilities-based carriers. In the Matter of Procedure for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, Seventh Report and Order, CC Docket No. 81-893 (rel. January 23, 1986).

[11] An essential facility is controlled by a monopolist and cannot reasonably be replicated by a competitor. Paladin Associates, Inc. v. Montana Power Co., et al.. 97 F. Supp. 2d 1013 (2000); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7^{th} Cir. 1983) cert. denied, 464 U.S. 891 (1983).

[12] Phase II Order, 2 FCC Rcd 3072, ¶¶ 3082,3084 (1987).

offer the transmission component of their information services separately, pursuant to tariff, and must also acquire such transmission for their own information service offerings pursuant to that tariff. The Commission reasoned that carriers providing telecommunications services and enhanced services could discriminate against competitors seeking to purchase the underlying transmission inputs.

As the Commission recognizes, it could use its ancillary jurisdiction under Title I to require the unbundling of the ILECs' transmission facilities.[13] While ONA has been used primarily for Title II purposes, the Commission could use its ancillary jurisdiction to further its Title II obligations to promote competition. Accordingly, we recommend that the Commission require the unbundling of all the essential facilities required to allow CLECs the ability to provision DSL services under its ONA rules.

Conclusion

The NYDPS urges the Commission to reconsider its tentative conclusion that wireline broadband internet access provisioned over a carrier's own facilities is an information service with a telecommunications component. However, should the Commission adopt its tentative conclusion, the NYDPS urges the Commission to maintain its ONA rules to ensure that competition in the local and advanced services markets is not eliminated.

Respectfully submitted,

Lawrence G. Malone

Lawrence G. Malone
General Counsel
Brian Ossias
Assistant Counsel
Public Service Commission
of The State Of New York
Three Empire State Plaza
Albany, New York 12223-1350

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Albany, New York

[13] NPRM ¶ 39.